

**United States Department of Labor
Employees' Compensation Appeals Board**

G.B., Appellant)	
)	
and)	Docket No. 18-1629
)	Issued: April 15, 2019
DEPARTMENT OF THE ARMY, DEFENSE)	
COMMISSARY AGENCY, Fort Sill, OK,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 6, 2018 appellant filed a timely appeal from a May 14, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 17, 2013, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly determined appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has been previously before the Board. The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 26, 1978 appellant, then a 39-year-old store worker, filed a traumatic injury claim (Form CA-1) alleging that on April 26, 1978 he injured his head and shoulder as a result of being struck by a metal door when bailing cardboard while in the performance of duty. He stopped work on the date of injury and returned to full duty on April 27, 1978. OWCP accepted his claim for contusion of the left shoulder and scalp hematoma.³

Thereafter, appellant filed claims for recurrence of disability (Form CA-2a) on October 16, 1984 and May 13, 2004. Evidence received in support of his claims included an April 14, 1980 report from Dr. Steven Rowlan, a Board-certified orthopedic surgeon, and an August 2, 1985 report from Dr. Jerry K. Martin, appellant's chiropractor.

In an August 1, 2005 report, Dr. Mark W. Cotton, a Board-certified family practitioner, noted that appellant suffered from organic brain syndrome and opined that he was mentally impaired as a result of a head injury that occurred in 1978. He further opined that appellant was unable to make decisions regarding his own affairs because of his mental impairment since the initial injury of 1978 and it was not expected that this condition would improve.

On July 19, 2004 OWCP denied the recurrence claim as the medical evidence submitted was insufficient to establish that the claimed recurrence was causally related to the accepted April 26, 1978 employment injury. By decision dated August 10, 2005, an OWCP hearing representative affirmed the July 19, 2004 decision.

Appellant requested review of the written record on September 22, 2005. By decision dated January 24, 2006, an OWCP hearing representative denied appellant's request as he had previously been granted a review of the written record and the recurrence issue could be resolved by requesting reconsideration.

Following an appeal to the Board, by decision dated December 11, 2006, the Board affirmed the January 24, 2006 and August 10, 2005 OWCP decisions, which denied appellant's claim for a recurrence and request for a review of the written record.⁴ Upon return of the case record to OWCP, appellant further requested reconsideration multiple times and each time OWCP

³ Appellant has a separate claim for a September 23, 1975 injury that OWCP accepted for a right lumbar muscle strain (under File No. xxxxxx397).

⁴ Docket No. 06-1337 (issued December 11, 2006), *petition for recon. denied*, Docket No. 06-1337 (issued June 15, 2007).

denied his requests by decisions dated July 15, 2008, August 13, 2009, January 22 and August 16, 2010, February 16, 2011, April 27, 2012, and October 28, 2015.

In a medical report dated June 11, 2015, Dr. Cotton indicated that appellant had been under his care since July 2003 for chronic low back pain and a closed-head injury with resulting organic brain syndrome. He opined that both injuries were work related and occurred approximately 36 years ago. Dr. Cotton found that appellant was totally disabled for work and had not held a job since the time of the injury.

By decisions dated February 20, 2009, February 16, 2011, November 2, 2012, and April 6, 2016, the Board affirmed OWCP's decisions, finding that appellant's requests for reconsideration had been untimely filed and failed to demonstrate clear evidence of error.⁵ By decision dated June 17, 2013, OWCP denied modification of its prior decision denying appellant's recurrence claim.⁶

Appellant subsequently filed several appeals. In orders dated December 2, 2016,⁷ January 17,⁸ May 3,⁹ and October 10, 2017,¹⁰ the Board dismissed appellant's appeals, finding that OWCP had not issued a final adverse decision within the prior 180 days over which the Board could properly exercise jurisdiction.¹¹

On February 13, 2018 appellant requested reconsideration and submitted a narrative statement along with an August 11, 2009 report from Dr. Cotton who reiterated that appellant had been under his care since "July 2003" for chronic low back pain and a closed-head injury with resulting organic brain syndrome and opined that appellant's conditions were work related. Dr. Cotton noted that appellant had been "100 [percent] disabled" and had not held a job since the time of injury. Appellant also resubmitted an April 14, 1980 report from Dr. Rowlan and an August 2, 1985 report from Dr. Martin, as well as copies of a traumatic injury claim (Form CA-1)

⁵ Docket No. 09-47 (issued February 20, 2009); Docket No. 10-634 (issued February 16, 2011); Docket No. 12-1515 (issued November 2, 2012); Docket No. 16-0319 (issued April 6, 2016); and Docket Nos. 15-202 & 14-738 (issued May 21, 2015), *denying petition for recon.*, Docket No. 15-0202 (issued April 4, 2016).

⁶ On February 6, 2014 appellant appealed a purported December 19, 2013 OWCP decision. The Clerk of the Appellate Boards docketed the appeal as No. 14-738. The Board dismissed the appeal on May 6, 2014 as the appeal was not timely filed. Docket No. 14-738 (issued May 6, 2014). On November 6, 2014 appellant appealed a purported May 6, 2014 OWCP decision. The Clerk of the Appellate Boards docketed the appeal as No. 15-202. On May 21, 2015 the Board issued an *Order Dismissing Appeal* in Docket No. 15-202 and *Denying Petition for Reconsideration* in Docket No. 14-738, finding that there was no final adverse OWCP decision in which it could assume jurisdiction and appellant did not file a timely petition for reconsideration in appeal No. 14-738. *See* Docket Nos. 15-202 & 14-738 (issued May 21, 2015).

⁷ Docket No. 16-0633 (issued December 2, 2016).

⁸ Docket No. 16-1844 (issued January 17, 2017).

⁹ Docket No. 17-0516 (issued May 3, 2017).

¹⁰ Docket No. 17-1443 (issued October 10, 2017).

¹¹ The Board further denied appellant's petition for reconsideration. *Order Denying Petition for Reconsideration* Docket No. 16-0319 (issued May 3, 2017).

regarding a September 23, 1975 employment injury, a request for examination and/or treatment dated April 26, 1978, a claim for continuing compensation on account of disability (Form CA-8) dated February 7, 1985, and a claim for a recurrence of disability (Form CA-2a) dated March 13, 2004.

By decision dated May 14, 2018, OWCP denied appellant's request for reconsideration, finding it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.¹² This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹³ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System.¹⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹⁵

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹⁶ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹⁷

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the

¹² 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹⁵ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁶ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁷ *Id.*; *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *supra* note 14 at Chapter 2.1602.5 (February 2016).

weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁸

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations²¹ and procedures²² establish a one-year time limit for requesting reconsideration, which begins on the date of the original OWCP decision. The most recent merit decision was OWCP's June 17, 2013 decision, which found that the evidence of record was insufficient to establish that appellant sustained a recurrence of disability causally related to the accepted employment injury of April 26, 1978. As appellant's request for reconsideration was not received until February 13, 2018, more than one year after the June 17, 2013 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in the denial of his claim.²³

The Board finds that the evidence submitted by appellant in support of his request for reconsideration does not raise a substantial question as to the correctness of OWCP's June 17, 2013 decision or shift the weight of the evidence of record in his favor.

In support of his request for reconsideration, appellant submitted a narrative statement and an August 11, 2009 medical report from Dr. Cotton who merely reiterated his statements from previous reports, noting that appellant had been under his care since July 2003 for chronic low back pain and a closed-head injury with resulting organic brain syndrome. Dr. Cotton also reiterated his opinion that appellant's conditions were work related.

Although appellant submitted the report of Dr. Cotton on reconsideration, he did not sufficiently explain how largely duplicative or cumulative evidence raised a substantial question

¹⁸ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁹ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 14 at Chapter 2.1602.5(a) (February 2016).

²⁰ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²¹ 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

²² *See supra* note 14.

²³ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

as to the correctness of OWCP's decision.²⁴ Thus, the Board finds that the report of Dr. Cotton is insufficient to shift the weight of the evidence in favor of appellant or raise a fundamental question as to the correctness of OWCP's decision denying his request for reconsideration.

The remaining evidence submitted was duplicative of documentation and medical reports previously of record and fails to demonstrate clear evidence of error with respect to the June 17, 2013 decision.²⁵ Appellant has not explained how resubmission of this evidence raises a substantial question concerning the correctness of OWCP's decision.

Therefore, the Board finds that the evidence submitted in support of the untimely request for reconsideration is insufficient to shift the weight of the evidence in favor of appellant's claim or to raise a substantial question that OWCP erred in its June 17, 2013 decision. Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request, as it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

²⁴ See *P.B.*, Docket No. 18-0265 (issued September 5, 2018); *D.E.*, 59 ECAB 438 (2008).

²⁵ See *L.M.*, Docket No. 14-1738 (issued March 3, 2015) (where the claimant resubmitted medical reports previously of record, the Board found that the evidence was duplicative and failed to demonstrate clear evidence of error).

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board